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Supreme Court of the United States

October Term, 1962

No. 547

REINSURANCE AGENCY, INC.,
Petitioner,

vs.

LIBERTY NATIONAL INSURANCE COMPANY,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Reinsurance Agency, Inc., your petitioner, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in the above entitled case on June 28, 1962.

OPINIONS BELOW

The opinion of the District Court (R 14-23) is reported at 181 F. Supp. 1. Since nine additional copies of the record as printed for the use of the Court of Appeals have been filed pursuant to Rule 21(4), the opinion of the District Court is not appended to this petition, Rule 23(1) (i). The opinion of the Court of Appeals has not been reported. A copy is appended as Appendix I.

JURISDICTION

The judgment of the Court of Appeals was en-

tered on June 28, 1962, and is appended as Appendix II. A petition for rehearing was denied on August 1, 1962, and said order denying petition is appended as Appendix III.

The jurisdiction of this court is invoked under the provisions of Title 28, U. S. C. Section 1254(1).

QUESTIONS PRESENTED

1. Whether the proceedings and judgment of a state court in rehabilitation proceedings, the effect of which proceeding and judgment was to establish, for a time, an operating receivership, the effect of the judgment being merely to terminate that receivership and restore the assets of the company to the company, is res judicata as to the beneficiary of a contract, where said beneficiary has never been made a party in the state court action, where the law specifically does not require the filing of any claim during rehabilitation and where nothing set forth in the state court's judgment purports to pass upon the validity, enforcibility or other status of the contract.

2. Whether under Idaho insurance rehabilitation law the rehabilitator is an operating receiver, for purposes of determining by what body of law he should be bound; or whether he is indeed possessed of some other legal capacity, not named by the Court of Appeals, to which such capacity no specific body of law, but rather dictatorial and irreversible authority, attaches.

3. Whether the construction the Court of Appeals places upon Idaho's insurance rehabilitation law violates the United States Constitution, Article

1, Section 10(1) as impairing the obligation of contracts by permitting a rehabilitator to cancel the onerous obligations incurred under the contract, while permitting the retention of benefits received in exchange for the obligations.

4. Whether the construction the Court of Appeals places upon Idaho's insurance rehabilitation law violates Amendment 14, Section 1, United States Constitution, and Article 1, Section 13, Idaho Constitution, as allowing deprivation of property without due process, by allowing the mere act of rehabilitation to constitute the bar of res judicata as against all creditors of the rehabilitated company, as to obligations coming due prior, during and after the rehabilitation.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

"No state shall * * * pass any * * * law impairing the obligation of contracts, * * *." U.S.C. Const. Art. I, Sec. 10(1)

"* * * nor shall any state deprive any person of * * * property, without due process of law * * *." U.S.C. Const. Amend. 14, Sec. 1

"* * * No person shall be * * * deprived of * * * property without due process of law." Idaho Constitution, Article 1, Sec. 13; 1 Idaho Code 55

Pertinent portions of Idaho statutes involved are quoted below. All references to Idaho Code sections refer to title 41, Insurance, as the same existed prior to the extensive 1961 Insurance Code revision, and are to be found in the 1959 Cumulative Pocket

Supplement of original Volume 7; 1947 Idaho Code. 41-118 and 41-122 are a codification of Chapter 50, Sections 1 and 5, 1951 Idaho Session Laws. 41-3504, 41-3505, 41-3507, 41-3510, 41-3511, and 41-3523 are codifications of Chapter 95, Sections 4, 5, 7, 10, 11, and 23, 1951 Idaho Session Laws. Section 31 of 1951 Idaho Session Laws, Chapter 95 repealed all acts or part of acts inconsistent or in conflict therewith. (1959 Cumulative Pocket Supplement, Idaho Code, Volume 7, page 425.)

"41-118. Hearings.—The commissioner may hold a hearing for any purpose within the scope of the Insurance Code, title 41 as he may deem necessary. He shall hold a hearing,

(a) if required by any provision of the Insurance Code, title 41, or

(b) upon written demand for a hearing made by any person aggrieved by any act, threatened act, or failure of the commissioner to act, if such failure is deemed an act under any provision of the Insurance Code, title 41, or by any report, promulgation, or order of the commissioner other than an order on a hearing of which such person was given actual notice or at which such person appeared as a party, or order pursuant to the order on such hearing.

Any such demand for a hearing shall specify in what respects such person is so agrrieved and the grounds to be relied upon as basis for the relief to be demanded at the hearing.

The commissioner shall hold such hearing demanded, within thirty (30) days after his receipt of

the demand, unless postponed by mutual consent." 1959 Cum. Pocket Sup. p. 334, 335

"41-122. Show cause notice.—If any person is entitled to a hearing by any provision of the Insurance Code, title 41 before any proposed action is taken, the notice of the proposed action may be in the form of a notice to show cause stating the proposed action may be taken, unless such person, shows cause at a hearing to be held as specified in the notice why the proposed action should not be taken, and stating the basis of the proposed action." 1959 Cum. Pocket Sup. p. 335

"41-3504. Grounds for rehabilitation.—The commissioner may apply for an order directing him to rehabilitate a domestic insurer * * *." 1959 Cum. Pocket Sup. p. 417

"41-3505. Order of rehabilitation—Termination. —1. An order to rehabilitate a domestic insurer shall direct the commissioner forthwith to take possession of the property of the insurer and to conduct the business thereof, and to take such steps toward removal of the causes and conditions which have made rehabilitation necessary, as the court may direct. * * *" 1959 Cum. Pocket Sup. p. 418

"41-3507. Order of liquidation. — 1. An order to liquidate the business of a domestic insurer shall direct the commissioner forthwith to * * * give notice to all creditors who may have claims against the insurer to present such claims * * *."1959 Cum. Pocket Sup., p. 418

"41-3510. Conduct of delinquency proceedings

against insurers domiciled in this state. — 1. Whenever, under the laws of this state, a receiver is to be appointed in delinquency proceedings for an insurer domiciled in this state, the court shall appoint the commissioner as such receiver. * * *

2. As domiciliary receiver, the commissioner shall be vested * * * with the title to all property * * * as of the date of entry of the order directing him to rehabilitate * * *.

* * * 4. The commissioner, as domiciliary receiver, * * *.

5. * * * the domiciliary receiver shall * * * proceed to conduct the business of the insurer * * *.

6. * * * commissioner may appoint * * * special deputy commissioners * * * shall be subject to all the duties imposed upon the receiver with respect to such proceedings." 1959 Cum. Pocket Sup. p. 419

"41-3523. Time to file claims. — 1. If upon the granting of an order of liquidation under this act, * * * the commissioner shall notify all persons who may have claims against such insurer and who have not filed proper proofs thereon, to present the same to him * * *, within four months from the date of the entry of such order * * *." 1959 Cum. Pocket Sup. p. 423

STATEMENT OF THE CASE

Statement of Facts

Petitioner and respondent made a contract on September 1, 1955, (R 17) contemporaneous with a contract between respondent and Transatlantic Cas-

ulty Underwriter's, Inc. (R 110) wherein respondent agreed to pay petitioner five percent of all premiums it received from Transatlantic under that contract. This was in consideration of petitioner's having brought respondent and Transatlantic together. (R 17) This contract between the parties was to continue so long as respondent wrote insurance in Germany through Transatlantic, and if that business was to be cancelled, petitioner was to receive ninety days' notice, so petitioner could place the writings elsewhere. (R 84-86, 132-133)

On September 24, 1956, repondent was placed in rehabilitation by the state district court, and B. J. Albertson was designated acting rehabilitator. (R 172-175)

On December 20, 1956, the rehabilitator caused a letter to be sent to petitioner, attempting to cancel petitioner's right to receive its five percent commission. (R 197) The rehabilitator admits that he never made any report to the state court about this attempted cancellation, and admits that the state court never did pass upon whether the rehabilitator had a right to cancel petitioner's commission contract. (R 195, 204 and 206) This admission by Albertson is completely borne out by the state district court's record of proceedings, which complete record was admitted in evidence as Exhibit 47. As this exhibit is exceedingly lengthy, it is not set forth in this petition nor as an appendix hereto but reference is made to Appendix I, opinion of the Court of Appeals, at page 14 wherein are set forth the only portions of the entire state district court file which could be said to have any bearing on petitioner's contract.

Exhibit 47 referred to by Judge Merrill is the complete compilation of the state district court's record. (R 172)

The trial court found the rehabilitator to be a receiver. (R 27, Findings of Fact X and XIV) The acting rehabilitator in his testimony refers to taking the company into receivership through the receivership proceedings of our law, which permits the department to take a company either as an operating receivership for rehabilitation or liquidating receivership and "we chose to take them into the operating receivership and rehabilitation." (R 170)

Counsel for respondent calls the order of September 24, 1956, an order placing respondent in receivership. (R 172-174)

Petitioner's five percent contract was not a main reason for the rehabilitation. (R 208)

The district court entered judgment for petitioner for $22,335.91, plus interest and costs. (R 31) The appellate court reversed the district court, holding (1) that the Idaho state court's judgment approved the cancelation of petitioner's contract (App. I, p. 12); (2) that petitioner was required by law to file a claim in the state court proceedings if it felt aggrieved by the cancellation. (App. I, p. 9 and 11); and (3) that the contract in dispute was one of the assets of respondent taken over by the rehabilitator but was also one of its excessive burdens. (App. I, p. 11 and 12).

A petition for rehearing filed by the petitioner was denied. (App. III)

Basis of Federal Jurisdiction

This is a diversity of citizenship case. Respondent is a citizen of Idaho and petitioner is a citizen of Illinois. A sum in excess of $10,000.00 exclusive of interest and costs is involved. The United States District Court for the District of Idaho had jurisdiction under Section 1332, Title 28 U.S.C. The United States Court of Appeals for the Ninth Circuit recognized this jurisdiction, and its own jurisdiction under Section 1291, Title 28 U.S.C. (App. I, p. 1)

REASONS FOR GRANTING WRIT

1. The decision of the court below is in conflict with the decision of another court of appeals on the same matter, and not in accord with applicable decisions of the Supreme Court.

A. The Court of Appeals held that the rehabilitator could cancel or abrogate the contract, leaving petitioner without remedy even though petitioner was not a party to the state court action.

(1) The Court of Appeals for the Fifth Circuit, in Southern Cotton Oil Co. v. Morrison, 21 F. 2d 786, held that an action by a creditor will lie against a debtor, even where the caim arose because of a receiver's cancellation of the contract. This action was brought after the receivership had ended and the debtor's assets returned to it, and was based on a contract existing prior to the receivership.

(2) The Court of Appeals for the Tenth Circuit, in Continental Bank and Trust Company v. Apodaca, 239 F. 2d 295, was dealing with a case involving an Idaho insurance company in the throes of

liquidation. That court held that there is no jurisdictional impediment to a state court's adjudication of substantive rights to property in possession of a federal court receiver, and that the converse is also true.

B, (1) The Supreme Court, in The Texas and Pacific Railway Co. v. Johnson, 151 U. S. 81, held that a railroad could be sued after termination of an operating receivership, for personal damages occurring during the receivership, even where the receivership court had ordered all claimants to present their claims to it during termination proceedings.

The Idaho statutes pursuant to which the state court appointed the rehabilitator designate him an operating receiver. (IC 41-3510) If he is originally, or later, designated a liquidating receiver, then claims must be presented to him within four months of his notifying claimants. (IC 41-3523)

(2) The Supreme Court in Morris v. Jones, 329 U.S. 545, held that the establishment in another court of the existence and amount of a claim against a debtor undergoing liquidation in no way disturbs the possession of the liquidation court. Thus, if the State Court's proceedings had been converted to liquidation, the instant suit would still not have been barred, in so far as it sought to establish the existence and extent of the claim. But matters never progressed to this stage. The assets were returned to respondent and the operating receivership ended. That district court action was an action in rem or quasi in rem. Petitioner was not named a party, nor served with any process of the court. The action in this case,

between petitioner and respondent, is an action in personam. The Court of Appeals, in the majority opinion, reflects its confusion as concerns matters in rem and in personam, assets and obligations, when it states "The September 1, 1955 contract was one of the assets of appellant * * * and as such asset was within the State Court's jurisdiction. The rehabilitator * * * cancelled the contract * * * ridding the appellant's business from the excessive burdens of its * * * contracts, like the September 1, 1955 contract, was one of the most urgent reasons for the rehabilitation * * *." (App. I, p. 11, 12) Thus the Court of Appeals says one can keep the assets (in rem) and destroy the obligations (in personam), all in an action in which the obligees are not parties and their rights (in personam) are never litigated.

(3) This Court, in Northern Pacific Railway Company v. Boyd, 288 U.S. 482, held that the property of a company remains subject to the claims of nonassenting unsecured creditors, even where the company is reorganized into a new corporation.

2. The decision of the court below is upon an important state question and is in conflict with applicable state law.

A. The most glaring misapplication of state law to be found in the opinion of the Court of Appeals is its decision that "on the question of cancellation, appellee was if it wished privileged to have a hearing, as expressly provided in the Idaho Insurance Code." (Citing IC 41-118 and 4-122, Vol. 7, 1959 Cumulative Pocket Part, p. 334-5) These two statutes, quoted at length at p. 4 and 5 of this petition, do not in any way

either compel or allow a creditor to have an administrative commissioner's hearing. Indeed if that were the effect of those sections, they would have been repealed by Section 31, of Chapter 95, 1951 Sessions Laws, which was enacted subsequent to Chapter 50, same session laws, of which Sections 41-118 and 41-122 are a codification, since this interpretation would squarely conflict with IC 41-3523, pertinent parts set forth at page 6 of this petition, having to do iwth filing of creditor's claims.

Examination of the entire Idaho insurance laws shows 4-118 and 41-122 to relate to persons aggrieved by the commissioner's administrative acts, such as refusal to issue brokers' licenses. It has nothing whatever to do with the Idaho Insurance Rehabilitation law then existing, and the Court of Appeals in its majority opinion obviously decided the case in direct conflict with the state statutes. The dissenting opinion (App. I, p. 15) correctly states the applicable state law.

B. The Court of Appeals, by failing to treat the rehabilitator as an operating receiver, decided in direct conflict with IC 41-3510, designating him to be a receiver.

3. The decision of the court below has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this court's power of supervision.

The Court of Appeals decided that an action in rem, in State Court, is res judicata as to a creditor's in personam action. The majority opinion fails to decide whether a rehabilitator is a receiver. The de-

cision attempts to confer upon the commissioner, in violation of state statutes and state and federal constitutional provisions, the power to deprive creditors of their property without any process of law whatever. The decision plainly shows a complete misunderstanding or disregard by the majority of the Court of the applicable state law. The dissent, in Judge Merrill's opinion, points up this inadequacy by succinctly stating the proper application of the law. The majority decision makes repeated reference to the state court's judgment approving the cancellation. (App. I, p. 9, 10, 11, 13) The true, plain and obvious fact is that the cancellation was never called to the state court's attention, a fact the rehabilitaor himself admits. (R 195, 197, 204, 206) Flying in the face of reason, the majority opinion calls the obligation owed to petitioner an asset. (App. I, p. 11) An asset would be part of the res, and subject to the state court's jurisdiction. But it was an unliquidated liability instead, as the majority decision in the same breath, also recognizes. (App. I, p. 12) Thus an action on it, this action, was in personam. The majority opinion recognizes that the assets were never liquidated, nor the company. (App.I, p. 3). The majority also closed its eyes to Idaho law when it held that petitioner could and should have filed a claim. (App. I, p. 9) No provision is made in Idaho law for filing a creditor's claim during rehabilitation. The only provision made for filing a claim is in event of liquidation, and in that event the statute provides for the receiver's obtaining an order directing creditors to be given four months' notice to file claims. (IC 41-3507, IC 41-3523, p. 5, 6) Such flagrant disregard for the laws and statutes of the state for whom an im-

portant question of local law is being decided is felt to amply warrant, an exercise of this Court's power of supervision.

Respectfully submitted,

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APPENDIX I

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

LIBERTY NATIONAL INSURANCE COMPANY,
Appellant-Cross-Appellee,

vs.

REINSURANCE AGENCY, INC.,
Appellee-Cross-Appellant.

No. 16,829
June 28, 1962

Appeal from the United States District Court of Idaho, Northern Division

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Before: CHAMBERS and MERRILL, Circuit Judges, and BOWEN, District Judge

BOWEN, District Judge:

This is a diversity of citizenship case. Appellant Liberty National Insurance Company, the defendant in the Trial Court, is a citizen of Idaho, and appellee Reinsurance Agency, Inc., the plaintiff in the Trial Court, is a citizen of Illinois. A sum in excess of $10,000 exclusive of interest and costs is involved. The Trial Court under § 1332, Title 28 U. S. C., had, and this Court under § 1291, id., has jurisdiction.

This appeal involves incidents of the rehabilitation of appellant insurance company. The main issue here is whether the appellant's rehabilitator, who on September 24, 1956 was appointed and ordered by the Idaho State Court to take control of appellant's insurance business and remove the causes which made

rehabilitation necessary, effectively cancelled the September 1, 1955 contract of appellant to pay appellee insurance brokerage commissions.

Appellant entered into by that contract a written agreement dated September 1, 1955, in return for appellee's assistance in obtaining for appellant the insurance business involved, to pay monthly to appellee a 5% commission on all money remitted to appellant by appellant's agent respecting the agent's automobile insurance business in Germany of which appellant desired to become the insurer. There were paid for the period before September 1956 all such contracted commissions including the October 19, 1956 payment of $1,780.19 on the August 1956 commission account, which payment, however, the Trial Court held was unauthorized, as more fully appears below. No other such payments were made under the commissions contract to appellee from September 1, 1956 up to the time of trial.

Pursuant to an official examination of the business affairs of appellant, the Idaho State Department of Insurance found and reported to a proper Idaho State Court in effect that appellant was in serious financial difficulty and had understated its claims liability several hundred thousand dollars, that its surplus was completely wiped out, and that its capital was seriously impaired. Thereupon the State Court of Idaho, upon application of that State's Insurance Commissioner, entered that Court's order of September 24, 1956 under the provisions of Idaho Code, Sections 41-101, 41-3504 and 41-3505, directing the Commissioner to take control of the appellant company, its business and all its assets and to con-

duct all business of appellant and to take action, subject to court direction, for removal of the causes and conditions which made rehabilitation of the company necessary. The order further appointed the Commissioner as rehabilitator who, through his deputy as acting rehabilitator, proceeded with the required rehabilitation.

Thereafter the rehabilitator cancelled, reduced or adjusted the commission payments of about 75% to 80% of all the commission contracts in force when the rehabilitator took control including the above mentioned September 1, 1955 agreement of appellant to pay appellee the 5% commission, which was cancelled by the rehabilitator, but which cancellation was found ineffective by the Trial Court because the rehabilitator continued to receive remittances from appellant's agent respecting the German business. Also, the rehabilitator took control of all the capital stock of appellant, sold some of it to new stockholders and supervised the replacement of the old with new corporate officials.. The rehabilitator also reduced and adjusted appellant's payments and allowances to its agent for the German business. All of these acts of the rehabilitator were approved upon review by the State Court, and rehabilitation was terminated and the rehabilitated business and assets were returned to appellant on May 28, 1957. Neither the appellant itself nor its business or assets had been liquidated during rehabilitation.

Appellee was during rehabilitation given notice of the cancellation of the 5% commission contract and was reminded by the rehabilitator of appellee's right to file claim or make objection in State Court

on account of such cancellation, but appellee failed to do that. Instead, after termination of the rehabilitation and the return to appellant of its rehabilitated business and assets, appellee refused to recognize cancellation and brought this action in the United States District Court of Idaho seeking, under the rehabilitator-cancelled contract, recovery of $38,568.00 for the unpaid 5% commissions on all premiums received by appellant from appellant's agent for German business from September 1, 1956 and during all the rehabilitation period and for the entire subsequent period up to the time of trial.

Appellant in its answer in the Trial Court denied liability and, among other things, pleaded nullification of the September 1, 1955 commissions contract by the rehabilitation proceedings and by the rehabilitator's cancellation of the contract, pleaded further that appellee was estopped in this action to repudiate the rehabilitator's cancellation of the contract and the State Court's approval of such cancellation, and sought recovery of the $1,780.19 commissions paid without authorization to appellee during rehabilitation.

The Trial Court entered judgment upholding validity of the commissions contract and awarded judgment to appellee against appellant for the 5% commissions on all premiums paid during the months following termination of rehabilitation beginning with June 1957 and continuing through May 1959, the last full month up to the time of trial, less the $1,780.19 unauthorized payment of October 19, 1956, in the remaining sum of $22,335.91, plus Trial Court costs of $1,032.50, but denied appellee any recovery

of such commissions on any premiums paid by appellant's agent during the period of rehabilitation because the State Count's injunction had forbidden the payment of the commissions during rehabilitation.

Except as to that credit of the $1,780.19 unauthorized payment on the total amount found due appellee from appellant, the Trial Court refused to grant any and all other relief requested by appellant.

Each party, as to the part of the Trial Court's judgment adverse to it, appeals to this Court.

Appellant's principal contention is in effect that, under the applicable Idaho law, like similar laws in other states, rehabilitation proceedings are not debtor-creditor proceedings involving primarily the rights and duties of creditors and debtors, but that rehabilitation proceedings are intended to uphold and enforce the public interest, welfare and policy which require that insurance companies not engage in unbusinesslike, extravagant and wasteful practices impairing or likely to impair the solvency, integrity and business reputation of those like appellant who for business purposes contract to insure policyholders against loss from insurable risks, that appellee is not entitled to recover anything in this case, and that appellant should be allowed recovery of the $1,780.19 paid improperly during rehabilitation to appellee.

Appellee's contentions center upon its insistence that, in effect, so far as concerns the commissions contract of September 1, 1955, the rehabilitator, like a general receiver, took the appellant's contracts subject to their encumbrances, and that while rehabili-

tating the appellant's business, the rehabilitator could not, as part of the rehabilitation process, cancel the commissions paying contract of September 1, 1955 while continuing to receive and use for rehabilitation the profits from appellant's German business agency, as was done in this case, and that appellee should have been by the Trial Court and should be here allowed recovery against appellant for all commissions accruing under the contract for September 1956 and all months during rehabilitation and for all subsequent months until the time of trial, without deduction of the $1,780.19 payment of October 19, 1956 because, appellee contends, that was correctly credited to the August 1956 commissions account as it should have been. We note that the commissions contract called for payment of the commissions during the month next after the month of their accrual, so that as to the September 1956 commissions accruing before the rehabilitation order of September 24, 1956, payment did not become due until the following October which was subsequent to the September 24, 1956 rehabilitation order under which all commissions payment was stopped.

As to the Idaho statutory provisions relating to the grounds for rehabilitation, the State Court's authority to order rehabilitation, appoint rehabilitators and issue injunctions in aid of rehabilitation, and the authority of rehabilitators, of insurance companies, see Idaho Code, Title 41, Sections 101, 3504, 3505, 3510 and 3512 (I.C.A. Sections 41-101, 41-3504, 41-3505, 41-3510 and 41-3512).

Consideration of the provisions of those Idaho related statutes above mentioned convinces us that

Idaho law on the subject of rehabilitation of irresponsible insurance businesses provides for the application of comprehensive remedies, judicial and administrative, with sweeping powers granted to a proper State Court and its rehabilitator to take possession of and to manage all business, property and assets of such businesses, and to prevent interference by any and all other persons with such possession and management, and to remove the causes making rehabilitation necessary.

In the case of Caminetti v. Guaranty Life Ins. Co., 126 P2d 159,164 (Cal., 1942), referring to similar California laws the court in part said:

> "(15-17) The insurance commissioner of the State of California is a public officer, clothed with the power of the State. The business of insurance is one charged with a public interest."

And in Caminetti v. Pacific Mut. Life Ins. Co. of California, 139 P. 2d 908, 913, 917 (Cal., 1943) it was at page 913 held:

> "* * * It has been held that the commissioner acts 'as an officer of the state * * * in the public interest' regardless of the fact that his 'duties * * * as conservator are in the nature of those of a receiver or trustee.'" (Citing).

And further at page 917, the same Court stated:

> "(15-18) * * * It is settled that contract and property rights must yield to legislation in the interest of the general welfare. (citing cases) That the power of the commissioner with respect to statutory proceedings against insolvent or delinquent insurers is of general public concern is not open to question. (citing cases) It is for

> the Legislature to determine what the interests of the public require and what measures are necesssary for their protection. (citing cases)".

Agents do not have a vested interest in future insurance premiums against insolvency receivers or against rehabilitators. Layton v. Ill. Life Ins. Co., 81 F. 2d 600, 602; People v. Peoria Life Ins. Co., 34 N. E. 2d 829 (136 A.L.R. 151). The same is true of policy holders as to whom, in Carpenter v. Pac. Mut. Life Ins. Co., 74 P. 2d 761, 774-775, the California Supreme Court said:

> "Neither the company nor a policyholder has the inviolate rights that characterize private contracts. The contract of the policyholder is subject to the reasonable exercise of the state's police power. The only restriction on the exercise of this power is that the state's action shall be reasonably related to the public interest and shall not be arbitrary or improperly discriminatory. * * * * This phase of state control is extremely important. Insurance is a public asset, a basis of credit, and a vital factor in business activity. Obviously, if an insurance company gets into financial difficulties, something must be done to remedy the situation. Either the company must be liquidated, and its assets distributed to its creditors, thus immeasurably injuring many of its policyholders who are thus deprived of insurance protection, or the business must, if possible, be rehabilitated. The public has a grave and important interest in preserving the business if that is possible." (citing).

It has been held that under some state statutes the rehabilitator, by the order, and as of its date, directing him to take possession of the assets, acquires

title to the assets of the insurance company to be rehabilitated. Ace Grain Co. v. Rhode Island Ins. Co., 107 F. Supp. 80.

The Idaho State Court's authority respecting the subject of this litigation including the question whether or not the commission contract of September 1, 1955 should be cancelled is prior and paramount to this Court's authority touching the same subject. Hutchins v. Pac. Mut. Life Ins. Co., 97 F. 2d 58, 60 and cases there cited.

To determine in the present action appellee's requested relief based on its repudiation of the State Court's approval of cancellation of the September 1, 1955 contract is to re-decide in a federal court not appellate to the State Court what was previously decided by the Idaho State Court when it had unquestioned jurisdiction in the rehabilitation proceeding. In that proceeding on that question of cancellation, appellee was if it wished privileged to have a hearing, as expressly provided in the Idaho State Insurance Code. Idaho Code, Vol. 7, 1959 Cum. Pocket Part p. 334-5, 41-118, 41-122. Under a well-known legal principle appellee is supposed to have known that law and to have contracted with it in mind. Layton v. Ill. Life Ins. Co., supra; People v. Peoria Life Ins. Co., supra, cert. den. 86 L. ed. 551. Appellee also had advance written notice of the rehabilitator's intention to cancel, and appellee further had notice from the rehabilitator's later reminder of appellee's right to such hearing.

Confirming a previous telephone conversation with appellee, the rehabilitator by his office assist-

ant's letter of December 20, 1956 gave appellee notice that the September 1, 1955 contract would be cancelled as of December 31, 1956, thereby with the telephoned notice giving appellee at least 10 days advance notice of such intended cancellation. Subsequently during rehabilitation, in his letter of May 3, 1957 about 25 days before entry of the State Court's final judgment approving such cancellation, the rehabilitator reminded appellee that

> "* * * With the company under rehabilitation proceedings and under the jurisdiction of the Court, *and with this matter known to you, it would be assumed that you would take prompt action after receipt of our letter of December* 20, 1956. * * *" (emphasis added)

and also indicated that he might have to object to appellee's objections in court as knowingly not timely made if appellee should so make any. By the word "action" in the above quoted excerpt from the rehabilitator's 25-day-before-judgment reminder, he must have meant "court action", because the other kinds of action normally taken before commencing court action had already been taken by the appellee and the rehabilitator.

From the foregoing and reasonable inferences therefrom, it seems obvious that appellee had both in law and in fact notice of his right to a hearing in the State (rehabilitation) Court upon his present objections to such cancellation, and that he also had such notice from the rehabilitator's reminder, and that the State Court thought so when it approved the cancellation. Appellee, however, did not seek a hearing in that State Court proceeding, took no court action

therein, and the cancellation of the contract become final as to appellant and appellee with the approval of such cancellation by the State Court's judgment and order. Appellee, as well as appellant, if aggrieved, could and should have in that proceeding laid the foundation for proper appellate review.

In Hutchins v. Pac. Mut. Life Ins. Co., supra, at page 60 (of 97 F. 2d) it was by this Court held:

> "(4) Having acquired possession of the res by appropriate action, the state court drew to itself the power to determine, subject to review on appeal or certiorari, all questions germane to the proceeding. As said in Lion Bonding & Surety Co. v. Karatz, (67 L. ed. 871), * * * 'If the legality of the state court's action was to be questioned, it could be done only by laying the proper foundation through appropriate proceedings in that court.' The way was open to appellant, by intervention in the state court, to be heard on all matters sought to be litigated here.' These questions have been as effectually withdrawn from the jurisdiction of the lower Federal courts as has the property of the insurance company itself." (citation added). See, generally, Neblett v. Carpenter, 83 L. ed. 182, 187-188 (Headnotes 1-4).

The September 1, 1955 contract was one of the assets of appellant taken over by the rehabilitator pursuant to the State Court's order in the rehabilitation proceedings, and the contract as such asset was within the State Court's jurisdiction. The rehabilitator with the State Court's approval cancelled the contract in the rehabilitation process because the insurance claims losses and costs attributed to the related German business had been grossly disproportionate to the premiums received on that business thereby

contributing in large part to the depletion of appellant's reserves which was one of the important causes making rehabilitation necessary. Ridding the appellent's business from the excessive burdens of its reserves depleting contracts, like the September 1, 1955 contract, was one of the most urgent reasons for the rehabilitation of appellant.

The above quoted statement of this Court in *Hutchins* was made before the termination of the litigation in the state court concerned in that case, but the principle announced in *Hutchins* by this Court is just as applicable here. The jurisdiction of the State Court over the September 1, 1955 contract in this insurance company rehabilitation proceedings was valid and has never been questioned. Since appellee had the express statutory right to a hearing, and had actual notice of such right, the requirement of procedural due process is satisfied. Appellee here questions not such jurisdiction but only what the State Court accomplished by the exercise of it. As basis for recovery in this case, appellee, respecting jurisdiction, asserts only error of the State Court judgment which if proper foundation had been laid would have been subject to review by proper appellate courts, not including the Trial Court or this Court. Neither appellee nor appellant sought such review. As to both of them that judgment is still binding, and the appellee has no right to raise any such questions here. For similar reasons the appellant is in a like position. Hutchins v. Pac. Mut. Life Ins. Co., supra; Neblett v. Carpenter, supra.

Subsequent to the Idaho State Court's judgment of approval of cancellation, not only was no appellate

review had or sought, but that Court has not, nor have the parties rescinded or amended such cancellation, and the cancelled contract of September 1, 1955 has not been reinstated. So far as concerns the record in this case, that contract to this day, rightly or wrongly, remains cancelled by the final judgment of the State Court with unquestioned jurisdiction, and neither appellant nor appellee as to any matter or thing disclosed by this record has in law any right or duty except as already ordered by the State Court.

Because of the foregoing among other reasons, it follows that the awards by the Trial Court of money to the appellee and of credit to appellant on sums found due from appellant to appellee were incorrect and should be set aside and reversed, and this case should be dismissed without relief to either party in the Trial Court or this Court. So ordered.

MERRILL, Circuit Judge, dissenting

I dissent.

I agree that under Idaho law rehabilitation of an insurance company permits its escape from burdensome contracts, but I do not apprehend that it permits the rehabilitated company to continue to receive the benefits of a contract and escape only from its detriments. Yet it seems to be that this is precisely what occurs here.

Here the services for which appellee by its agreement was entitled to a commission had been fully performed. The benefits, subject to the agreed commission, were flowing to the company. The district court ruled that if the rehabilitator had felt that the price being paid (commission) for these benefits was too

high, he could have terminated the whole arrangement, but that the company could not continue to enjoy the benefits and unilaterally relieve itself from the necessity for paying the stipulated compensation. I agree.

Nor do I feel that this claim has been barred by res judicata. It does not appear that the issues presented by this case were ever considered in the state court or resolved by that court. Appellant apparently relies upon the following paragraph in the order of the state court terminating rehabilitation:

> "That those acts and actions taken by the Commissioner of Insurance of the State of Idaho, and his Deputy, as the acting Rehabilitator, toward removal of the causes and conditions which made the rehabilitation of said insurance company necessary are hereby approved."

This order was made in response to a report on the rehabilitation proceedings made by the rehabilitator. This report deals at length with the problems encountered in securing refinancing of the company. The cancelling of unprofitable lines of insurance and the discontinuation of writing insurance in certain localities are dealt with in brief and general terms in one paragraph. One sentence of this paragraph reads:

> "The company has continued writing insurance both in Alaska and in Germany and the underwriting experience in these two places has been made known to (the new shareholders)."

Other than this I find nothing in the report which could possibly be said to bear on appellee's contract.

Nor do I find here a bar by nonclaim. The Idaho statutes do not require the filing of any creditor's claim during rehabilitation. The only requirement concerning a creditor's submission of a claim is when the company is being liquidated. IC 41-3507.

I conclude that appellee is entitled in full to the commissions earned pursuant to its contract and accordingly would affirm the district court upon the appellant's appeal and reverse upon the appellee's cross-appeal.

(Endorsed) Opinion and Dissenting Opinion Filed June 28, 1962.

Frank H. Schmid, Clerk.

APPENDIX II

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

LIBERTY NATIONAL INSURANCE COMPANY,
Appellant-Cross-Appellee,

vs.

REINSURANCE AGENCY, INC.,
Appellee, Cross-Appellant.

No. 16829

JUDGMENT

APPEAL from the United States District Court for the District of Idaho, Northern Division.

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the District of Idaho, Northern Division, and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this Cause be, and hereby is reversed and this case is dismissed, without relief to either party in the trial court or this Court.

Filed and entered June 28, 1962.

APPENDIX III

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Excerpt from Proceedings of Wednesday, August, 1, 1962.

Before: CHAMBERS, MERRILL, Circuit Judges, and BOWEN, District Judge.

ORDER DENYING PETITION FOR REHEARING

On consideration thereof, and by direction of Judges Chambers and Bowen, IT IS ORDERED that the petition of Apellee-Cross-Appellant, filed July 23, 1962, and within the time allowed therefor by rule of court, for a rehearing of above cause be, and hereby is denied.

Judge Merrill, dissenting, would grant the petition for rehearing.